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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

JOHN PAUL "J.P." MURRELL,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAY FRED FRIEDMAN
147 Jefferson
Suite 406
Memphis, Tennessee
38103
901/527-6518

Counsel for Petitioner

Mr. John Booth Farese
Attorney at Law
P. O. Box 98
Ashland, Mississippi 38603

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QUESTIONS PRESENTED

I

WHETHER THE GOVERNMENT PROVED THAT THE ALLEGED EXTORTIONATE ACTIVITY OF THE PETITIONER HAD THE REQUISITE EFFECT ON COMMERCE.

II

WHETHER THE INDICTMENT FAILED TO SUFFICIENTLY APPRISE THE PETITIONER OF THE CHARGES AGAINST HIM, RESULTING IN HIS INABILITY TO PREPARE AN ADEQUATE DEFENSE.

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OPINION BELOW

This case has not been reported by the courts below. The opinion of the United States Court of Appeals for the Sixth Circuit, styled "Order" and filed by that Court on September 29, 1980, is appended to this Petition. Case No. 79-5368.

A Petition for Rehearing was not filed. A Motion for Stay of Mandate was filed by the Petitioner, and was granted on October 23, 1980. The Motion and the Order Staying Mandate are included in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was set out in the Appendix hereto. Jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are Amendments Five and Six of the United States Constitution,

and 18 U.S.C. §2 and §1951. The provisions are fully set out below.

AMENDMENT V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S.C. 18 §2. PRINCIPALS

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

U.S.C. 18 §1951. INTERFERENCE WITH COMMERCE BY THREATS OR VIOLENCE

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section--

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

June 25, 1948, c. 645, 62 Stat. 793.

STATEMENT OF THE CASE

John Paul "J.P." Murrell, the defendant named above as petitioner, was indicted on February 8, 1979. The single count indictment charged Murrell with conspiracy to obtain property from a person with his consent wrongfully induced under color of official right in violation of 18 U.S.C.

§1951. The indictment also charged the petitioner with aiding and abetting in violation of 18 U.S.C. §2.

The above indictment was predicated upon the allegations of Lawrence Verble, the proprietor of a night club in Putnam County, Tennessee. Mr. Verble had been selling whiskey in a county where such sales were prohibited by law. Mr. Verble contacted Mr. Washington Butler, who had been Director of Urban and Federal Affairs of the State of Tennessee in regard to the frequent raids on his nightclub. Mr. Verble told Mr. Butler that he was being raided because he was black. Mr. Butler called Mr. Lee Hyden, who was the Director of the Alcoholic Beverage Commission, in regard to the matter. Mr. Hyden stated to Mr. Butler that Mr. Verble was in a dry county and that the Alcoholic Beverage Commission was just doing its job. Mr. Butler communicated to Mr. Verble that if

his problem was racial discrimination, the man to contact was the petitioner, J.P. Murrell. Mr. Verble repeated to Mr. Murrell that his problem was one of discrimination in that he was being raided because he was black. Mr. Murrell said he would look into the matter and suggested that Mr. Verble contact an attorney, Mr. Tomlin, who was the President of the Tennessee Trial Lawyer's Association at the time. In addition, Mr. Murrell requested that Alcoholic Beverage Commission Agent Ernest Withers inquire into the matter. Mr. Withers was paid $600 by Mr. Verble as expense money for the trip to Cookeville and for taking five photographs of Mr. Verble's nightclub. At a later date, Agent Withers approached Mr. Verble and told him that it would take $15,000 to stop the raids on Verble's nightclub. Mr. Verble agreed to pay Mr. Withers the sum of $10,000. Mr. Verble delivered $8,000 to Mr. Withers in three

installments and was subsequently raided again. Mr. Verble never gave any money to Mr. Murrell. After Verble was raided he contacted Mr. Withers who told him to rest easy and that he would look further into the problem and that he, Withers, was in the process of getting Verble's money together to give back to him. Mr. Verble then contacted Mr. Murrell who told him that he would see that Verble got his money back. Mr. Withers then returned money to Verble on two occasions amounting to approximately $6,800. The defendant Murrell subsequently on two occasions did pay a total of approximately $1,600 to Verble.

Ernest Withers maintained that he transferred the entire $8,000 paid him by Verble to the petitioner, Murrell, and that he (Withers) received no part of such sum.

Upon the foregoing facts, Ernest Withers and John Paul "J.P." Murrell were indicted under 18 U.S.C. §1951 and 18 U.S.C.

§2. Ernest Withers entered a plea of guilty in this matter and agreed to testify in exchange for the government's recommendation of a one-year sentence and the government's promise not to prosecute him in another matter.

The petitioner, Murrell, entered a plea of not guilty as to the charges in the indictment. Upon trial in the United States District Court for the Western District of Tennessee, Western Division, the petitioner was convicted, and was sentenced to serve two years in prison and to pay a fine of $7,500.

The petitioner filed a timely Notice of Appeal and Brief with the United States Court of Appeals for the Sixth Circuit. On September 29, 1980, that Court entered an Order affirming the judgment of the District Court. The petitioner then filed a Motion for Stay of Mandate with the Clerk of the Court of Appeals for the Sixth

Circuit. The motion was granted, and the Stay of Mandate was entered on October 23, 1980.

No Petition for Rehearing has been filed.

The petitioner seeks review of the ruling of the Court of Appeals for the Sixth Circuit, and outright reversal of the conviction.

Original jurisdiction in the United States District Court was predicated upon the alleged violation by the petitioner of 18 U.S.C. §1951 and 18 U.S.C. §2.

ARGUMENT

I

THE GOVERNMENT FAILED TO PROVE THAT THE ALLEGED EXTORTIONATE ACTIVITY OF THE PETITIONER HAD THE REQUISITE EFFECT ON COMMERCE.

The statute under which defendant was charged, 18 U.S.C. §1951, provides in pertinent part:

> §1951. Interference with commerce by threats or violence.

> (a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, shall be fined not more than $10,000 or imprisoned not more than twenty years or both.
> [Emphasis supplied]

Hence, some type of effect on interstate commerce must be proven as an essential element of the offense.

The Government at trial attempted to fulfill the commerce requirement through the respective testimony of John Wisinger and Russell Clarkson. Both witnesses were employees of Cookeville, Tennessee beer distributors. Wisinger testified that his company had sold the alleged victim, Lawrence Verble, Pabst Blue Ribbon Beer, which was made in Perry, Georgia. Clarkson testified that his company sold Verble Anheuser Busch products which originated either in St. Louis, Missouri, or Columbus, Ohio. Neither witness was asked whether

there had been any decline in Verble's purchases during the time period of the alleged extortion conspiracy. Further, both witnesses explained on cross-examination that beer sales have a tendency to fluctuate due to certain inherent factors. Wisinger stated that beer sales vary with the seasons and the brand of beer preferred by the retailer's patrons, as did Clarkson.

The petitioner submits that the very nature of this proof from the witness stand demonstrates that beer sales at Verble's nightclub fluctuated because of conditions at the point of sale, and not because of any activity on the part of the petitioner.

Petitioner recognizes that this Circuit, as well as others, applies the de minimus rule with regard to effect on commerce. U.S. v. Harding, 567 F.2d. 299, 302 (6th Cir. 1977). However, petitioner submits that the Hobbs Act, 18 U.S.C. §1951, requires that there be shown some effect

on commerce caused by the alleged illegal activity. A mere showing that the alleged victim purchased articles, unrelated to the subject matter of the alleged scheme, which had once traveled in interestate commerce, establishes no delay, obstruction or effect on commerce, and, hence, does not violate the statute.

In Harding, Id., which involved the illicit sale of copies of the Tennessee real estate broker's examination, it was shown that real estate brokers involved in the case made use of out of state listings and services directed to potential customers of other states. Harding, at p. 302. Thus, the obtaining of a real estate broker's license enabled persons to participate directly in interstate commerce.

This case is likewise distinguishable from the recent case of U.S. v. Richardson, 596 F.2d. 157 (6th Cir. 1979), where the Court of Appeals for the Sixth Circuit

recognized that a fluctuation in amounts of interstate goods purchased could serve as an effect on commerce when the extortionate demands diminished the victim's purchasing power. Petitioner would point out that the opinion of the Court of Appeals for the Sixth Circuit notes the testimony of a witness who stated that he would have bought additional flowers and produce with his money if he had not had to pay for protection. Petitioner submits that the record in this case is silent with regard to this type testimony. Lawrence Verble was never asked if his beer purchases fluctuated nor whether his alleged payments to Withers hampered his ability to purchase beer. There is no showing that these payments, allegedly routed to the petitioner, affected beer sales at the nightclub in any way.

Petitioner would argue that although a de minimus effect on commerce is all that

is required, the Government must show that the illegal activity caused that effect. An analogous situation occurred in U.S. v. Nerone, 563 F.2d 836 (7th Cir. 1977). In Nerone, the Court reversed convictions for violation of 18 U.S.C. 1962 because the Government never proved that the illegal activity, a gambling enterprise, affected commerce. The defendants in Nerone ran a mobile home park which rented space to owners of mobile homes which were manufactured outside the state. While the Court did not question the fact that the mobile home park affected commerce, it found that there had been no connection between the illegal activities and the activities of the trailer park. Id., at 851. Instead the Court found that the effect on commerce, an essential element of the offense, was not present. The Court stated:

> ...The Government might have successfully prosecuted the twelve Defendants if it had attempted to introduce

> evidence showing that the 'Casino operation' affected commerce. Under the approach which had been taken in many reported decisions, only slight evidence would have been required. Here, because of apparent prosecutorial uncertainty about the theory of its case, a matter by now sufficiently explored, the Government made no effort at all to connect the dice and card games to interstate commerce. Nerone, p. 854-855.

Petitioner would therefore submit that the failure of the Government to prove that the activities charged in the indictment affected commerce constitutes a failure to prove an essential element of the offense. It follows that the jury was without a proper basis to support a conviction and the Court's failure to grant defendant's motion for a judgment of acquittal was error of reversible dimension. The defect complained of herein is jurisdictional and goes to the very heart of this prosecution.

The petitioner respectfully submits that the correct test to be applied is that there must be shown a tangible, demonstrable

effect on commerce, and that this effect was caused by the act or acts of the accused. Mere proof that the alleged victim sold beer, among other things, which had moved in interstate commerce, is not sufficient to invoke the jurisdiction of the federal courts. The petitioner submits that the word "affects" was included in the statutory enactment in order to confer jurisdiction. It is the petitioner's position that the conclusion in U.S. v. Nerone, supra, applies, and that there has been shown no effect on commerce as a result of the petitioner's activities. The conviction stands unsupported by the proof and must therefore be reversed.

II

WHETHER INDICTMENT FAILED TO SUFFICIENTLY APPRISE THE PETITIONER OF THE CHARGES AGAINST HIM RESULTING IN HIS INABILITY TO PREPARE AN ADEQUATE DEFENSE

Petitioner submits that an accused has a right to be tried on the charges brought

by the Grand Jury and that the indictment in the present case is subject to so many interpretations, charges so many offenses in one count, and has been amended at trial to the degree that there can be no assurance that the petitioner has been convicted of an offense charged by the Grand Jury. As a result, petitioner contends that his rights under the Fifth and Sixth Amendments to the United States Constitution have been violated.

The indictment in the present case alleges in pertinent part:

> ...the defendants Ernest Columbus Withers and John Paul "J.P." Murrell unlawfully, willfully and knowingly did conspire with each other, and with others yet to the Grand Jury unknown to obstruct, delay and affect commerce, and the movement of articles and commodities in commerce, by obtaining, and attempting to obtain property, that is, money, from a person, or persons, with his, or their consent wrongfully induced under the color of official right in violation of Title 18, United States Code, §§ 1951 and 2. (App. 18)

Before proof in the matter began,

defense counsel asked the District Court to rule on whether the indictment charged a conspiracy, the substantive offense, aiding and abetting, or all three. The attorney for the United States replied that the one count indictment charged the substantive offense but did not charge conspiracy. The District Court ruled that the indictment charged both conspiracy and aiding and abetting, but did not charge a substantive offense. Later, the District Court concluded that the indictment alleged a substantive charge of conspiracy and a supplemental charge of aiding and abetting. Defense counsel promptly objected to the ruling. The remainder of the trial proceeded upon the District Court's interpretation of the statute and the indictment, with one very important exception. In charging the jury, the District Court interpreted the indictment to also include the "offense" of "attempt

to conspire."

Uncertainty over the indictment's interpretation existed not only in the mind of the prosecution, the District Court, and defense counsel, but also in the mind of the jury. On three separate occasions the jury requested additional instructions from the Court. On the first such occasion the jury asked:

> How much involvement in a conspiracy does a man have to be to be considered a part of the conspiracy?

In response, the District Court repeated part of its original instructions to the jury.

In their second inquiry the jury asked for "a copy of the Court's definition of conspiracy." In response, the Court copied three pages from its charge and tendered these to the jury.

Finally, the jury foreman indicated that the jury could not agree and asked the Court for a "summary with regard to the

charges...What it is that the government has to prove." Before receiving the requested summary, however, the jury reached a verdict without further instruction. The verdict returned by the jury read:

> The verdict, we the jury on the issues joined for our verdict say, we find the defendant John Paul "J.P." Murrell, as to Count One, guilty as charged in the indictment.

Defense counsel requested that the Court inquire of the jury as to what particular charge they found the petitioner guilty of, but the Court denied defense counsel's request and excused the jury. An additional request to interview the jury was likewise denied.

> 1. THE INDICTMENT FAILS TO GIVE NOTICE OF THE OFFENSE OR OFFENSES CHARGED.

Counsel for the petitioner submits that the indictment is subject to so many constructions that it fails to specify the offense or offenses charged as to comply with the Fifth or Sixth Amendments to the

United States Constitution. United States v. Maselli, 534 F.2d 1197, 1201 (C.A. 6, 1976).

Counsel for the petitioner points out that there has long been a distinction between the commission of the substantive offense and conspiracy to commit those offenses. United States v. Bradley, 421 F.2d 924, 927 (C.A. 6, 1970) citing: Pinkerton v. United States, 328 U.S. 640, 643, 644, 66 S.Ct. 1180, 90 L.Ed. 1489; Pereira v. United States, 347 U.S. 1, 11, 74 S.Ct. 358, 98 L.Ed. 435 (1953); Callahan v. United States, 364 U.S. 587, 590, 81 S.Ct. 321, 5 L.Ed.2d 312 (1960). Consequently, petitioner submits that the District Court erred in concluding that conspiracy under 18 U.S.C. §1951 was a substantive offense. The District Court's ruling that conspiracy is a substantive offense under 18 U.S.C. §1951 brings into issue the construction of the aiding and abetting charge under 18

U.S.C. §2. Does the indictment charge the petitioner with aiding and abetting the offense of conspiracy?

On appeal, the United States Court of Appeals for the Sixth Circuit agreed with counsel for petitioner that one cannot be an aider and abettor to a conspiracy but went on to state:

> Since an aider or abettor is also guilty of conspiracy, an additional indictment or charge containing aider or abettor language would not prejudice a defendant. Indeed, if anything, such language in a charge to the jury might clarify the type of conduct which could amount to participation in a conspiracy. (App. 4)

Counsel for the petitioner contends that the aider or abettor language did not clarify, but rather, further added to the confusion over just what, exactly, was charged in the indictment, thus, resulting in prejudice to the defendant.

In addition, the District Court added the charge of attempt to conspire to the list of offenses charged in the indictment

as is evidenced by the Court's erroneous interpretation of 18 U.S.C. §1951 and the subsequent charge to the jury.

Petitioner contends that the diametrically opposed construction of the indictment by the prosecution which drafted it and the District Court which continuously changed its interpretation of the indictment supports his contention that the indictment fails to give notice of the offense or offenses charged and is violative of petitioner's rights under the Fifth and Sixth Amendments.

2. THE INDICTMENT IS DUPLICITOUS FOR CHARGING MORE THAN ONE OFFENSE IN A SINGLE COUNT.

The District Court interpreted the indictment in this cause as charging the substantive offense of conspiracy, and the supplemental charge of aiding and abetting, and charged the jury to the effect that a conviction could be had on the basis of an attempt to conspire. Clearly, the

petitioner Murrell was placed in jeopardy and his conviction may well be based on the charge of "attempting to conspire."

Petitioner points to Federal Rule of Criminal Procedure 8(c) which states:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
> [Emphasis supplied by counsel]

In construction of this rule petitioner relies on United States v. Starks, 515 F.2d 112 (C.A. 3, 1975) and Abney v. United States, 431 U.S. 651 (1977).

In Starks, the defendant was charged in a single count with conspiracy to extort and attempting to extort under the Hobbs Act. The Court of Appeals for the Third Circuit found the count duplicitous and ordered a new trial where the

Government should be required to elect between the conspiracy and attempt charges, Starks, Id., at page 118.

Later, upon remand to the District Court, the Government elected to proceed on the conspiracy charge. The defendants promptly moved for dismissal because the retrial would expose them to double jeopardy. The resulting controversy and the appeal therefrom is styled Abney v. United States, supra. In Abney, the double jeopardy argument was denied, but apparently because the District Court at the original trial had instructed the jury to return a guilty verdict only if the Government had proved both crimes charged in the indictment beyond a reasonable doubt, Abney, Id., at pages 664-665.

The petitioner contends that his position is well reflected in the Third Circuit's opinion in Starks, supra, except in that the Judge in the case at hand gave no

charge that guilt must be found on all charges encompassed in the single count indictment before conviction could result. As a result, the petitioner contends that the indictment was duplicitous and now that a verdict has been rendered, the petitioner may stand convicted of "conspiracy," "attempted conspiracy," or as an accessory.

In light of the Starks and Abney opinions, the petitioner prays that the indictment be dismissed and that his conviction be reversed. The petitioner also contends that a new trial is inappropriate in that a plea of double jeopardy in such a proceeding would only point out the impossible situation into which the petitioner has been cast by the duplicitous indictment.

3. THE INDICTMENT IN THIS CAUSE WAS FATALLY AMENDED BY THE DISTRICT COURT DURING THE COURSE OF TRIAL BY THE ADDITION OF THE CHARGE OF "ATTEMPT TO CONSPIRE".

As counsel for petitioner has

heretofore related, the District Court initially ruled that the indictment charged, in the single count, the substantive offense of conspiracy and the supplementary offense of aiding and abetting. But the District Court charged the jury to the effect that:

> The government must prove these essential elements: First, that the defendant Murrell conspired or attempted to conspire to induce his victim to part with money. [Emphasis supplied by counsel]

The case was tendered to the jury upon the premise that a verdict could be returned upon the finding of a conspiracy or an attempt to conspire. In short, the "offense" of "attempt to conspire" was added to the offenses charged in the indictment. The Court of Appeals for the Sixth Circuit found the instruction "erroneous" but "technically not a variance or amendment" since "there is no such thing as an 'attempt to conspire'." (App. 5) The Sixth

Circuit found the error to be harmless since it "only occurred once" and since defense counsel made no objection at trial.

Petitioner contends that while "attempt to conspire" may not constitute an actual offense, the inclusion by the District Court of "attempt to conspire" in the jury instruction nevertheless created in the minds of the jurors a real offense on which a verdict could be rendered. Indeed, petitioner's conviction may well be based on the "attempt to conspire" language contained in the charge to the jury. Counsel for petitioner submits that the District Court's modification of the indictment to include "attempt to conspire" in the jury charge is far from harmless error. It in fact constitutes a fatal amendment to the indictment.

The Court of Appeals for the Sixth Circuit, in Watson v. Jago, 558 F.2d 330, 334 (C.A. 6, 1977), set out the test to

apply to determine whether or not there had been a constructive amendment under Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270 (1960):

> Under Stirone, the question to be asked in identifying a constructive amendment is whether there has been a modification at trial in the elements of the crime charged. United States v. Somers, supra, 496 F.2d at 744; United States v. De Cavalcante, supra, 440 F.2d at 1272; United States v. Silverman, 430 F.2d 106, 111 (2d. Cir. 1970), cert. denied, 402 U.S. 953, 91 S.Ct. 1619, 29 L.Ed.2d 123 (1971). Such a modification would result in a constructive amendment. Of course, if a different crime was added to the charges against which the defendant to meet, there would have been a constructive amendment. United States v. Sir Kul Chin, 534 F.2d 1032, 1036 (2d. Cir. 1976); United States v. Holt, 529 F.2d 981 (4th Cir. 1975). Watson v. Jago, 558 F.2d 330, 334 (C.A. 6, 1977). [Emphasis supplied by counsel]

Petitioner submits that when the above test is applied to his case it is clear that there was a modification, at trial, in the elements of the offense charged.

Petitioner submits that his failure to object to the inclusion of the attempt

to conspire language in the charge does not waive his objection to its inclusion.

> Defense counsel here cannot be said to have waived his objection to the variance by not raising the point at trial. United States v. Pandilidis, 524 F.2d 644, 647 (6th Cir. 1975). United States v. Beeler, 587 F.2d 340, 343 (C.A. 6, 1978).

Further, petitioner would submit that as a matter of law the defendant Murrell was prejudiced by the constructive amendment of the indictment. Watson v. Jago, 558 F.2d 330, 339 (C.A. 6, 1977), Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270 (1960). Consequently, the petitioner Murrell prays that his conviction be reversed.

Petitioner submits that all of the foregoing establishes the highly ambiguous nature of the indictment which the District Court Judge refused to cure upon motion. Petitioner submits that the indictment in this case is the source of such confusion, that there can be no

assurance that the petitioner has been convicted of an offense charged by the Grand Jury. Thus, petitioner asserts that there has been a denial of due process and that his conviction should be reversed.

Respectfully submitted,

JAY FRED FRIEDMAN
Attorney for Petitioner
147 Jefferson, Suite 406
Memphis, Tennessee 38103
901/527-6518

APPENDIX

No. 79-5368

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v. O R D E R

JOHN PAUL "J.P." MURRELL,

Defendant-Appellant

/

Before: LIVELY and KEITH, Circuit Judges
and LAMBROS, District Judge*

A jury found Defendant John Paul "J.P." Murrell guilty of violating the Hobbs Act, 18 U.S.C. §1951. The evidence at trial showed that Defendant Murrell received bribes from Lawrence Verble. Verble operated a nightclub which illegally sold liquor in a "dry" East Tennessee County. Murrell was supposed to use his influence

*Honorable Thomas D. Lambros, District Court Judge, sitting by designation.

as a state official to stop the Tennessee Alcoholic Beverage Commission's frequent raids on Verble's business. The proof at trial, interpreted favorably to the government, also shows that Murrell was unable to stop the raids and that he ended up refunding most of the bribe money to Verble.

The defendant first claims that the government has failed to show the requisite effect on interstate commerce. We think that the de-minimus test we applied in United States v. Richardson, 596 F.2d 157 (6th Cir. 1979) has been met. In Richardson, we found sufficient effect on interstate commerce where the victim businesses which paid bribes sold alcoholic beverages which originated outside the state of Tennessee. Business money which was used to pay bribes could not be used to buy out-of-state supplies. The evidence in this case was to the same effect as that in Richardson.

The defendant next argues that he was impermissibly convicted of a single conspiracy to extort while the proof showed several conspiracies. Specifically, defendant claims that any conspiracy to extort money from Verble was separate from any conspiracy to pay back the money when defendant was unable to help Verble out as he had thought. Unfortunately for the defendant, there was testimony that it was part of the original agreement that the defendant would pay back the bribe money if he was unsuccessful in stopping the raids on Verble's nightclub. It was thus proper for the government to allege a single conspiracy in the indictment and for the jury to convict the defendant of same.

Upon review of the transcript, we are also convinced that there was adequate proof of guilt and that no impermissible prosecutorial misconduct took place.

Two related issues have caused us some

concern. By its own terms, the Hobbs Act prohibits conspiracies to extort. In addition, under 18 U.S.C. §2, anyone who is charged with an offense is automatically deemed to be charged as an aider and abettor to the offense. Defendant was so charged here. On appeal, the defendant claims that one cannot be an aider and abettor to a conspiracy--one can only be a conspirator or not be a conspirator. The defendant has a good argument. However, we discern no prejudice to the defendant. Since an aider or abettor is also guilty of conspiracy, an additional indictment or charge containing aider or abettor language would not prejudice a defendant. Indeed, if anything, such language in a charge to the jury might clarify the type of conduct which could amount to participation in a conspiracy.

A second aspect of the indictment and charge troubles us. The Hobbs Act inter

alia, prohibits extortion, attempts to extort. The one count indictment in this case simply charged conspiracy to extort. In the charge to the jury, however, the district court made the following statement:

> The government must prove these essential elements. First, that the Defendant Murrell conspired or attempted to conspire to induce his victim to part with money... [Emphasis added]

The defendant characterizes this as a fatal variance or amendment to the indictment. See, e.g., United States v. Beeler, 587 F.2d 340 (6th Cir. 1978).

We disagree. There is no such thing as an "attempt to conspire". Conspiracy requires an agreement and one cannot be guilty of conspiracy if one only "attempts to agree." The instruction is thus erroneous, although technically not a variance or amendment.

We conclude, however, that this error

does not warrant reversal. First, no objection was made at trial. Second, this error only occurred once. The district court instructed the jury on three occasions. This error did not occur the second or third time that the jury was instructed. Under these circumstances, we are convinced that the error was harmless.

Accordingly, the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/
JOHN P. HEHMAN
Clerk

JUDGMENT OF TRIAL COURT

The petitioner, in the presence of the attorney for the Government and his own attorney, appeared before the United States District Court for the Western District of Tennessee, Western Division on October 19, 1979.

Having been convicted of violation of 18 U.S.C. §1951 and §2, the petitioner was ordered to be imprisoned for a period of twenty-four months and to pay a fine of $7,500.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appelle,

VS. NO. 79-5368

JOHN PAUL "J.P." MURRELL,

Defendant-Appellant.

MOTION FOR STAY OF MANDATE

Comes now the Defendant, JOHN PAUL "J.P." MURRELL, through counsel of record, Jay Fred Friedman, who hereby requests that this Honorable Court grant unto the Defendant a stay of mandate pending Defendant's application to the Supreme Court for a writ of certiorari.

The Defendant would show unto the

Court that an order affirming the judgment of the District Court was entered in his cause by this Honorable Court on September 29, 1980. Further, it appearing to the Defendant that he has thirty days from September 29, 1980, to make application to the Supreme Court for a writ of certiorari; and the Defendant intending to make such an application, it is the Defendant's request that this Court grant unto him a stay of mandate of thirty (30) days from this date, October 8, 1980. The Defendant further prays that the stay of mandate continue until the Supreme Court rules on Defendant's application for a writ of certiorari and continue until final disposition of the cause by the Supreme Court.

The Defendant would further state that upon inspection of this Court's order of September 29, 1980, (attached hereto) there remain several issues of concern to the Defendant. Three of those may be

briefly stated as: (1) Whether or not the government proved the requisite effect on commerce through the alleged extortionate activity; (2) whether or not one can aid and abett a conspiracy and the effect of the indictment's allegation and the District Court's charge, and (3) whether or not the District Court's inclusion of "attempt to conspire" language in the jury charge on an indictment for conspiracy to extort amounted to a fatal variance or amendment requiring reversal. Defense counsel notes that this Honorable Court expressed concern over at least two of the issues set forth above. Further, this Honorable Court seemed to agree with defense counsel's argument regarding issues (2) and (3) above but failed to discern prejudice to the Defendant. The Defendant respectfully submits that such errors concerning the indictment and charge to the jury are fundamental and of prejudicial

dimension. Accordingly, Defendant submits that a Petition for Writ of Certiorari in this cause would warrant further appellate review and would be neither frivolous nor interposed for delay. Consequently, Defendant prays that this Court enter an order staying the mandate in this cause as is herein requested.

Respectfully submitted,

/s/
JAY FRED FRIEDMAN (W01391)
Attorney for Defendant
147 Jefferson, Suite 406
Memphis, Tennessee 38103
901/527-6518

CERTIFICATE OF SERVICE

I, JAY FRED FRIEDMAN, hereby certify that a copy of the foregoing Motion for Stay of Mandate has been served upon Mr. Daniel Clancy, Assistant United States Attorney, Federal Building, Memphis, Tennessee 38103, by U.S. Mail, postage prepaid, this the 8th day of October, 1980.

/s/
JAY FRED FRIEDMAN

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 79-5368

UNITED STATES OF AMERICA,

Plaintiff-Appellee

vs.

JOHN PAUL "J.P." MURRELL,

Defendant-Appellant.

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record,

and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT

/s/
John P. Hehman, Clerk